SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB

Plaintiffs/ Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CONSERVATION, DIVISION OF OIL, GAS, AND GEOTHERMAL RESOURCES; and DOES 1 through 100, inclusive,

Defendants/Respondents.

AERA ENERGY LLC, BERRY PETROLEUM COMPANY LLC, CALIFORNIA RESOURCES CORPORATION, CHEVRON U.S.A. INC., FREEPORT-MCMORAN OIL &GAS LLC,LINN ENERGY HOLDINGS LLC,MACPHERSON OIL COMPANY, WESTERN STATES PETROLEUM ASSOCIATION, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATE, and INDEPENDENT OIL PRODUCERS AGENCY,

Respondents-in-Intervention

Case No. RG15 769302

ASSIGNED FOR ALL PURPOSES TO:
JUDGE GEORGE C. HERNANDEZ, JR.
DEPARTMENT 17

TENTATIVE DECISION

California Rule of Court 3.1590 et seq.

Date: July 15, 2016
Time: 8:30 a.m.
Dept: 17
Judge: Hon. George C. Hernandez, Jr.

Introduction

Plaintiffs and Petitioners, Center for Biological Diversity and the Sierra Club (Plaintiffs), filed their complaint against Defendant and Respondent California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR), alleging two causes of action for declaratory relief and writ of mandate. Plaintiffs seek a declaration that DOGGR has violated the Administrative Procedure Act (APA) by promulgating emergency regulations which allow underground injections of wastewater and other fluids into California aquifers lacking exemptions to continue into 2017. Plaintiffs also ask the court to issue a writ of mandate voiding the regulations and requiring DOGGR to take all necessary actions to immediately meet its alleged mandatory duty to prohibit such injections into non-exempt aquifers.

Background

The Safe Drinking Water Act

Congress passed the Safe Drinking Water Act (SDWA) in 1974 "… to assure that water supply systems serving the public meet minimum national standards for protection of public health."(1974 U.S. Code Cong. & Admin. News, at p. 6454 (H.R. Rep. 93-1185), [AR000032].) To enforce the act, Congress authorized the Environmental Protection Agency (EPA) to establish Federal standards to protect underground sources of drinking water, to establish a joint Federal-State system for assuring compliance with the SDWA and to authorize States to participate in enforcement.

Primacy

As part of the Federal-State system, the EPA could grant to a State primary enforcement responsibility ("primacy") if the State adopted and implemented adequate standards and enforcement measures. (42 U.S.C. §300h-1.) These standards included adopting an Underground Injection Control program (UIC). (1974 U.S. Code Cong. & Admin. News, at p. 6455 [AR000032-AR000033].) If a State does not request "primacy" or if the EPA withdraws primacy from a State, the SDWA imposes significant limitations

on a State's ability to participate in the regulation of its own underground water resources. (42 U.S.C. 300h-1(c).)

DOGGR

California, through Respondent Department of Conservation, Division of Oil, and Gas, now the Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) applied to participate in the EPA's program in 1982. The application included a "1425 demonstration" (AR000404) and a Memorandum of Agreement (MOA.) (Underground Injection Control Program, Memorandum of Agreement Between California Division of Oil and Gas and the United States Environmental Protection Agency, Region 9 [AR000404-AR000429].)

The MOA contained many agreements and understandings. It restated the policy of the program, ("... to prevent any underground injection that endangers an underground source of drinking water (USDW),") and acknowledged DOGGR's "primacy." (AR000405.)

The MOA contained section H. Aquifer Exemption. (AR000409.) It describes how a USDW may be exempted for purposes of an underground injection, the effect of an exemption, and the role of the EPA in reviewing exemptions.

The MOA also states:

> "After the effective date of this Agreement, an aquifer exemption must be in *effect prior to or concurrent with* the issuance of a Class II permit for injection wells into that aquifer" (emphasis added.)

(MOA, paragraph H. Aquifer Exemption, at pp. 6-7 [AR000409-AR000410].)

DOGGR did not comply with this provision.

DOGGR issued permits without first obtaining an aquifer exemption and approved injections if: a) the requester provided assurance that the injection was confined to an

approved zone and b) DOGGR verified confinement for vertical and lateral movement in order to protect adjacent aquifers and hydrocarbon reservoirs. (DOGGR Opposition Brief, p. 3, lines 2-8.) In 1982, DOGGR became aware that permitting errors, including border confusion and depth confusion, had led DOGGR to issue permits for injection wells into non-exempt zones. (*Id.* at p. 4 line 17-20.)

For purposes of this case only, it is assumed that DOGGR's conduct breached the terms of the MOA.

The EPA Responds to DOGGR

After DOGGR notified the EPA of the permitting errors, the EPA began to order DOGGR to take a number of corrective actions. (AR000119 at 121.) Among those actions the EPA ordered that "State approval of any new wells in aquifers without approved exemptions or into portions of aquifers that are outside the specific area exempted should be limited to State-approved projects in hydrocarbon-producing zones," and should be subject to a number of additional considerations. (DOGGR Opposition Brief, p. 5 lines 24-28.) For these wells, the EPA did not say that DOGGR was prohibited from issuing any permits without an "aquifer exemption."

In December 2014, the EPA approved DOGGR issuing some limited injection permits in hydrocarbon-producing zones that were not exempted under the SDWA. (DOGGR Opposition Brief, p.7, line 16.)

On March 9, 2015, the EPA set forth what it expected DOGGR to do in order to come into compliance with the SDWA. (AR000464-AR000467.) The EPA recognized that the schedule it imposed on DOGGR would require DOGGR to issue emergency orders (AR000465) and included a schedule for such orders. (AR000466.)

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Findings

1. The SDWA regulations do not have an "aquifer exemption before injection" requirement. (Opposition Brief by Respondents-In-Intervention Area Energy LLC et. al, pp. 8-16.P8.)

2. The SDWA requires a permit before injection.

3. The injections here were permitted.

4. The MOA is an agreement between the EPA and the State that the EPA considered in determining whether the State qualified for primacy. The EPA also considered a "1425 demonstration." (AR000404.)

5. The MOA includes the requirement that "an aquifer exemption must be in effect prior to or concurrent with the issuance of a Class II permit for injection wells into that aquifer." (AR000409-AR000410.)

6. The "aquifer exemption" requirement is a term of the MOA that is enforceable by the EPA.

7. If DOGGR breached the "aquifer exemption" term, that breach would trigger remedies included in the MOA that would be enforceable by the EPA.

8. Ultimately, the EPA could determine that California is no longer is entitled to primacy under the EPA's Federal-State system to enforce the SDWA.

9. The right and decision to enforce DOGGR's obligation not to issue permits without an exemption belongs to the EPA. Parenthetically, the EPA is helping the State achieve full compliance with the MOA.

10. Petitioners have no standing to enforce the MOA between the EPA and DOGGR.

11. The fact that "(t)he MOA has been formally incorporated by reference into and codified by the federal regulation that both approves and defines California's UIC

program under SWDA (40 C.F.R. §147.250)" (Plaintiff/Petitioner's Opening Brief, p. 4, lines 15 – 17) does not convert the terms of the MOA into "...a duty resulting from an office, trust, or station..." (Code Civ. Proc., §1085, subd. (a).)

12. The SDWA does not impose a clear and present duty on DOGGR that is enforceable by a writ. (See generally, Opposition of Western States Petroleum Association, California Independent Petroleum Association and Independent Oil Producers Agency In Response to Plaintiffs/Petitioners' Opening Brief, pp. 16-21.)

12. The terms of the MOA do not impose a mandatory duty on DOGGR enforceable by a writ of mandate to prohibit injections unless an aquifer exemption has been granted.

13. DOGGR's actions are consistent with, not in conflict with, the SDWA. (See generally Opposition Brief by Respondents-In-Intervention Area Energy et. al, pp. 8-16.)

14. The *King* case is distinguishable. *U.S. v. King* (9th Cir. 2011) 660 F.3d 1071, cited by Petitioners, is a criminal case that dealt with the power of Congress, not with how States should enforce the SDWA. The Court was asked to decide whether Congress could create an enforceable statute where the mere injection of water into an aquifer can be criminal without the government showing an injury. The Court's description of SDWA was in aid of explaining and understanding the design, scope and function of the law as it relates to the power of Congress to regulate an area. It described how the violation of such a law can result in an appropriate imposition of criminality. The *King* case did not address what a State must do to accomplish its responsibilities in enforcing the SDWA, which is the issue before this court.

15. Petitioner's claim for relief on the emergency regulations is moot because the emergency regulations have expired and been superseded by permanent regulations. However, the emergency regulations were properly promulgated under the APA. (See generally, Respondent California Department of Conservation, Division of Oil, Gas, And Geothermal Resources' Opposition Brief, pp. 20-25.)

Conclusion

"DOGGR has discretion to select the appropriate corrective action to remedy non-compliance with its UIC program. (Pub. Resources Code, §§ 3224 & 3226.) Similarly, DOGGR has discretion to select the appropriate corrective action to remedy any deficiencies in its UIC program, including the compliance schedule implemented as part of DOGGR's regulations (*Id.* at § 3106; see also, *id.* at § 3013 [Defendant "shall have all powers, including the authority to adopt rules and regulations, which may be necessary to carry out the purposes of this division."].)" (Opposition Brief by Respondents-In-Intervention Area Energy, et. al, p. 7, lines 17-22.) Plaintiffs have not demonstrated that DOGGR had a mandatory duty to prohibit Class II injections into non-exempt aquifers, that DOGGR violated any such duty, or that emergency regulations passed by DOGGR violated the APA.

Tentative Decision

The Petition for Writ of Mandate is denied.

Petitioner's claims for declaratory relief as to the emergency regulations are moot. Nevertheless, the emergency regulations were a reasonable and permissible response by DOGGR to remedy what DOGGR discovered was an error in its application of its obligations to the EPA and DOGGR's obligations under the SDWA.

Defendant and Respondent, California Department of Conservation, Division of Oil, Gas and Geothermal Resources is ordered to prepare a Statement of Decision, consistent with this Tentative Decision (CRC 3.1590(c)(3)), within thirty (30) days of the service of this Tentative Decision (CRC 3.1590(f)).

Dated: August 2, 2016

George C. Hernandez, Jr.
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Center for Biological Diversity et. al vs. California Dept. of Conservation
ACTION NO.: RG15769302

I certify that, I am not a party to the within action. I served the foregoing TENTATIVE DECISION by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

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I declare under penalty of perjury that the following is true and correct

Executed on August 3rd, 2016, 2016 at Oakland, California.

Chad Finke,
Executive Officer/Clerk

by Christina Momon
Deputy Clerk